ATTACHMENT 16

Plaintiffs' Motion for Leave to File Response to Intuitive's Objection to Certain Class Certification Reply Evidence

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		DMINISTRATIVE MOTION FOR
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-	· E	VIDENCE [FILED UNDER SEAL]
	Ju	dge: The Hon. Araceli Martínez-Olguín
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- 1	HOSPITAL PLAINTIFFS' ADMINISTRATIVE MOTION FOR LE	AVE TO FILE RESPONSE TO DEFENDANT INTUITIVE

HOSPITAL PLAINTIFFS' ADMINISTRATIVE MOTION FOR LEAVE TO FILE RESPONSE TO DEFENDANT INTUITIVE SURGICAL, INC.'S OBJECTION TO CERTAIN CLASS CERTIFICATION REPLY EVIDENCE Case No: 3:21-CV-03825-AMO-LB

Pursuant to Civil Local Rule 7-11 and 7-3(d), Plaintiffs Larkin Community Hospital, 1 2 Franciscan Alliance, Inc., and King County Public Hospital District No. 1 (collectively, 3 "Plaintiffs") submit this administrative motion for leave to file the attached Response ("Proposed Response") to Intuitive's Objection to Certain Class Certification Reply Evidence ("Objection"), 4 ECF No. 298. Intuitive Surgical, Inc. ("Intuitive") filed the Objection pursuant to Local Rule 7-5 6 3(d)(1), which provides that, "[i]f new evidence has been submitted in the reply, the opposing party 7 may file and serve an Objection to Reply Evidence [.]" Civ. L. R. 7-3(d)(1) (emphasis added). Any 8 such objection "may not include further argument on the motion." Id. Because Intuitive's Objection (1) violates both of those requirements, and (2) is inescapably a de facto, unauthorized sur-reply 9 (as shown below), the Objection should be stricken from the record. Alternatively, Plaintiffs hereby 10 11 request leave to demonstrate why the Objection is meritless and should be overruled.

First, Plaintiffs' expert Professor Einer Elhauge's challenged opinions do not constitute "new evidence." In fact, Prof. Elhauge rendered the objected-to opinions in his initial Class Certification Report—and, in some instances, even his Merits Reports—and Intuitive examined Prof. Elhauge about these opinions in his class certification deposition, which took place before Intuitive filed its Class Certification Opposition on August 2, 2024. See ECF No. 296-2 (Elhauge Corrected Class Cert. Report dated July 13, 2024) ¶¶ 643-44, 675, 680-81, 830, 846, 933-35; ECF No. 127-2 (Elhauge Corrected (Merits) Report dated Jan. 10, 2023) ¶ 375; ECF No. 127-4 (Elhauge (Merits) Rebuttal Report dated March 3, 2023) ¶ 426a. See also Declaration of Jeffrey J. Corrigan in Support of Hospital Plaintiffs' Administrative Motion for Leave to File Response to Defendant Intuitive Surgical, Inc.'s Objection to Certain Class Certification Reply Evidence, Ex. 1 at 51:3-6, 74:13-78:12, 118:2-7, 128:8-15, 136:17-137:6, 139:18-142:3. Accordingly, prior to filing its Class Certification Opposition, Intuitive knew full well that Prof. Elhauge had opined that the tying arrangements at issue increased Intuitive's market power on robots, and that factoring in that effect would, if anything, only increase the damages class members suffered from Intuitive's anticompetitive conduct. See Proposed Response § I. The objected-to opinions properly rebut the

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opinions of Intuitive's expert, Professor James Hughes, and should be considered by the Court.

Second, Intuitive improperly adds "further argument on the motion," in contravention of Local Rule 7-3(d)(1), in its discussion of both Prof. Elhauge's challenged opinions and Mark Early's declaration. For example, Intuitive includes an extended discussion of its view of the impact of Siegel v. Chicken Delight, Inc., 448 F.2d 43, 52 (9th Cir. 1971), on this case. See Objection at 2-3. But the parties addressed that issue extensively in their class certification briefing, and Intuitive's attempt to seize the last word on that issue under Rule 7-3(d)(1) is improper.

Similarly, in objecting to Mr. Early's declaration, Intuitive argues at length that the declaration is inadmissible parol evidence concerning an unambiguous written agreement. Objection at 3. But that is another issue the parties have already briefed, and Intuitive's untimely argument should be disregarded.

At any rate, Intuitive's objection that the Early declaration is inadmissible parol evidence is duplicitous. Indeed, Mr. Early's declaration was a response to extrinsic evidence Intuitive proffered--a declaration (and 12-page email chain exhibit) of Intuitive Controller Fredrik Widman-as proof that Larkin released its antitrust claims. *See* Proposed Response § II. Of course, Intuitive does not explain why it is entitled to introduce extrinsic evidence as to a disputed agreement, but Plaintiffs are not.

CONCLUSION

The Objection is nothing more than a thinly-disguised sur-reply that Intuitive had no right to file. The Court should either strike the Objection in its entirety or grant this motion for leave to file the Proposed Response to demonstrate why the Objection fails.

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